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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

This Document Relates to:
No. 3:18-cv-01586
(A.B., C.D., E.F., G.H., and I.J.)

Case No. 3:18-cv-01586-JSC

**CHART'S TRIAL BRIEF REGARDING
LOW LN2 INCIDENTS AT PFC IN 2013
AND 2014**

Judge: Hon. Jacqueline S. Corley
Trial Date: May 20, 2021

Pursuant to Rule 404(b) of the Federal Rules of Evidence, Chart Inc. hereby asks the Court to permit the introduction of evidence related to the documented incidents in 2013 and 2014 at the PFC laboratory where Tank 4's liquid nitrogen (LN2) level dropped to dangerous levels, including to zero. In support of its request, Chart submits the following Trial Brief:

BACKGROUND

On March 19, 2021, on Plaintiffs' motion, the Court entered its order precluding Chart's experts, Dr. Grace Centola and Dr. Franklin Miller, from testifying regarding multiple incidents in 2013 and 2014 where the LN2 in Tank 4 at PFC dropped to dangerous levels. (ECF No 724). The Court found the evidence to be "too attenuated to be probative" with respect to causation of the accident in March 2018. (*Id.* at 9:22-10:1; 14:13-15). At Plaintiffs' further request, the Court extended that ruling to lay witnesses on April 30, 2021. (ECF No. 777 at 4:1-9). However, the Court's order also stated, "[t]his ruling does not preclude Chart from eliciting testimony as to what in fact happened[.]" (*Id.* at 6-9).

The data from Tank 4's controller showed the following:

- Between July 19, 2013 and July 17, 2014, the liquid level in Tank 4 fell **below 9.0 inches** on 80 occasions.
- On October 30, 2013 the liquid level in Tank 4 dropped to **3.0 inches**.
- From December 26, 2013 to December 30, 2013 Tank 4 had a level **below 8.0 inches**.
- From December 28, 2013 to December 30, 2013 the level was **below 4.0 inches**.
- On December 30, 2013 the liquid level in Tank 4 dropped to **0 inches**.
- From January 17, 2014 to January 20, 2014 the level was again **below 8.0 inches**.
- On January 20, 2014 the level again dropped to **0 inches**.

(See ECF No. 632-2, Exhibit 5, Dr. Grace Centola's November 20, 2020 Expert Report, p. 15, ¶45) (emphasis added).

At her deposition on August 27, 2020, PFC embryologist, Erin Fischer testified on questioning by Plaintiffs' counsel that she had been scheduled to work on December 31, 2013 and January 20, 2014, that nothing unusual occurred with Tank 4 on those days, and that if a tank had run low on LN2 on December 31, 2013 or January 20, 2014, she would have heard about it. (August 27, 2020 Dep. Transcript of Ms. Fischer, 133:23-135:16, attached as Exhibit A). Ms. Fischer further testified to the following: "Q. Excluding March 4th, 2018, are you aware of any instance where a tank at PFC had less than 5 inches of liquid nitrogen in it with samples present? A. No. Q. And if either of those scenarios had happened, do you think you would have heard about it? A. Yes. Q. Are you confident you would have heard about it? A. Yes." (*Id.* at 132:5-14).

Similarly, PFC embryologist Dr. Jean Popwell, at her September 2, 2020 deposition and on questioning by Plaintiffs' counsel, testified: "Q. And excluding Tank 4, are you aware of any instance where a tank at PFC had less than five inches of liquid nitrogen in it with eggs and embryos present? A. No. Q. If that had happened, do you think you would have heard about it? [...] **THE WITNESS:** Yes. Q. Why is that? [...] **THE WITNESS:** It would have been a very unusual event." (September 2, 2020 Dep. Transcript of Dr. Popwell, 35:19-36:7, attached as Exhibit B) (objections omitted). Dr. Popwell testified the schedule showed she was working at the lab on December 30, 2013. (*Id.* at 51:25-52:11).

At the April 29, 2021 hearing on motions *in limine*, the Court explained its ruling excluding the 2013 and 2014 incidents, stating the incidents are "too remote in time" to be probative. (April 29, 2021 Hearing Transcript, 16:11-18).

At trial on May 27, 2021, on direct examination, Plaintiffs' counsel elicited a series of testimonial statements from PFC's Ms. Fischer related directly to the low LN2 level data in 2013 and 2014. Ms. Fischer testified the following:

- She has worked at PFC since September 2005. (May 27, 2021 Trial Transcript at 769:9-13).
- The lab performs QC checks daily. (*Id.* at 771:6-14).

- 1 • That includes checking liquid nitrogen levels in tanks like the ones she sees
- 2 here today [including Tank 4]. (*Id.* at 771:15-31).
- 3 • She does not recall ever being concerned that the PFC lab might run out of
- 4 LN2 during her time at PCF. (*Id.* at 777:20-25).
- 5 • Because PFC has **always** had adequate supplies of LN2. (*Id.* at 778:2-
- 6 9)(emphasis added).

7 Then, going further on direct, the following exchange took place between Plaintiffs’
8 counsel and Ms. Fischer:

9 **Q.** Did you **ever** observe lower liquid nitrogen levels than you would expect
10 in Tank 4?

11 **A.** No.

12 **Q.** **Always** had plenty of liquid nitrogen as far as you know?

13 **A.** As far as I know, yes.

14 **Q.** What about the other freezer tanks in the lab, did you **ever** see any tank that had
15 any concerning level of liquid nitrogen prior to March 4th, 2018?

16 **A.** No, I have not.

17 (*Id.* at 778:1-779:11) (emphasis added). On May 26, 2021 Plaintiffs’ counsel elicited similar
18 testimony from Dr. Conaghan. (See May 26, 2021 Trial Transcript at 492:13-18: “**Q.** Before
19 March 4th, was there **ever** an instance in which you believe the liquid nitrogen in Tank 4 ever
20 dropped below six inches? **A.** I believe it **never** dropped below six inches. **Q.** Would that have
21 been a notable event at the clinic? **A.** Absolutely, yes.”) (emphasis added).

22 **ARGUMENT**

23 Any “time gap” or attenuation with respect to the 2013 and 2014 incidents has now been
24 closed by Plaintiffs’ counsel’s direct questioning of PFC personnel regarding whether the PFC lab
25 has **ever** experienced low LN2 levels in Tank 4 (or any tank) prior to the March 4, 2018 incident.
26 At issue are people at a specific clinic, and their actions with respect to filling tanks, checking tank
27 LN2 measurements, supply tank issues, backdating measurement evidence, with a theory that those
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1 people let the tank run dry, which caused any damage to Plaintiff's eggs and embryos. With
 2 respect to 2013 and 2014, at issue are the same people at the same clinic, demonstrating the same
 3 conduct—they let the same tank LN2 drop to unsafe levels multiple times, and drop to zero twice.
 4 Further, their testimony at trial that PFC has never experienced low LN2 level issues is
 5 contradicted by this very evidence Chart now seeks to use.

6 Obviously PFC's record and actions with respect to LN2 levels (dating back to at least
 7 2005 when Ms. Fischer started working there) is significant to Plaintiffs' counsel as they defend
 8 PFC—they are provoking testimony about this evidence in their case. Plaintiffs' counsel's goal is
 9 clearly that the jury hears the lab never before experienced low LN2 levels in its tanks. Thus, they
 10 have now opened the door and made the 2013 and 2014 low LN2 level incidents a significant and
 11 relevant issue at trial.

12 Further, Ms. Fischer has testified at both deposition and trial to the following: (1) she was
 13 working on a day in 2014 when the evidence shows the LN2 level went to zero in Tank 4; (2) the
 14 LN2 levels are checked every day at PFC; (3) she is not aware of any instance where a tank at PFC
 15 had less than 5 inches of LN2 in it with samples present; (4) she never observed lower levels of
 16 LN2 in Tank 4 than she would have expected; (5) she does not recall ever being concerned that
 17 the PFC lab might run out of LN2 during her time at PCF; and (6) PFC has always had adequate
 18 supplies of LN2. (*See supra* 2:1-9; 2:21-3:17).

19 PFC personnel have provided testimony to the jury that can only infer PFC has never had
 20 an issue with low LN2 levels in its dewars or supply tanks. While the 2013 and 2014 incident
 21 evidence plainly contradicts this testimony, it is also plainly relevant, and admissible under Rule
 22 404(b). The incidents are admissible to show “proof of motive, opportunity, intent, preparation,
 23 plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2). “Rule
 24 404(b) is a rule of inclusion—not exclusion—which references at least three categories of other
 25 ‘acts’ encompassing the inner workings of the mind: motive, intent, and knowledge.” *United States*
 26 *v. Wells*, 879 F.3d 900, 928 (9th Cir. 2018) (citing *United States v. Curtin*, 489 F.3d 935, 944 (9th
 27 Cir. 2007)). The evidence shows PFC personnel must have had previous knowledge of low levels
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1 of LN2 at the lab, and it also shows lack of mistake or coincidence.

2 As Chart has explained, this evidence is relevant to the case against PFC and whether they
3 have had past issues with keeping LN2 properly supplied at the facility, and whether these issues
4 present deviations from the standard of care, just like Chart is alleging occurred at PFC at the time
5 of the incident. (ECF No. 746, 1:14-2:14; ECF No. 668 at 12:9-25). Chart's expert, Dr. Miller,
6 will testify that supply issues contributed to low LN2 level incident on March 4, 2018, which
7 Plaintiffs allege caused their damages. (See ECF No. 668 at 12:9-25). Dr. Centola will testify that
8 failure to properly monitor LN2 levels daily is a deviation from the standard of care, and the 2013
9 and 2014 low LN2 incidents at PFC demonstrate deviations from that standard of care that is
10 required to ensure sufficient protection of the stored samples. (*Id.*) This evidence is now crucial
11 for calling into question PFC's credibility, especially considering they claim to never have had
12 low LN2 issues at the lab, and to show how the PFC lab has operated over the years. Plaintiffs'
13 counsel now appear to agree such evidence is relevant to the case against PFC and they have
14 opened the door for its use.

15 This evidence is also now relevant for another reason: to show that even when Tank 4 goes
16 dry for a single day or less (as it did twice in 2013 and 2014) it keeps the tissue inside cold enough
17 to produce live births at better outcome rates than Tank 4 after the March 4, 2018 incident. During
18 Dr. Conaghan's testimony on May 26, Plaintiffs' counsel presented to Dr. Conaghan Trial Exhibit
19 180, which is a spreadsheet with live birth outcome data for Tank 4, including data from 2013 and
20 2014. Dr. Conaghan testified "The tissue that has been thawed from Tank 4 after March of 2018
21 has not performed as well as the tissue that was thawed from that tank beforehand or tissue that
22 was thawed from other tanks." (May 26, 2021 Trial Transcript at 551:3-6).

23 The 2013 and 2014 incident evidence helps demonstrate that where there is just a short
24 period of time that Tank 4 is without LN2 (as Plaintiffs claim here) it would not have caused
25 significant damage to Plaintiffs' tissue so as to cause worse live birth outcomes, *i.e.*, worse
26 performance. However, when there are longer periods of time without LN2, caused by slow
27 evaporation and not refilling the tank over the course of days (which is what Chart claims happened
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1 to Tank 4 at PFC), that is what produces the worse live birth outcomes Tank 4 has experienced
 2 after March 4. Plaintiffs' and Dr. Conaghan's claim that Tank 4 has produced worse live birth
 3 outcomes after the March 4 incident supports Chart's theory that Tank 4 was dry or had low levels
 4 of LN2 for a longer period of time—*i.e.* days, not hours. The 2013 and 2014 incident evidence
 5 will help explain that to the jury, and by introducing Trial Exhibit 180 (with its live birth data from
 6 2013 and 2014), Plaintiffs have further opened the door for its use.

7 Finally, Plaintiffs' counsel cannot now claim Rule 403 should prohibit introduction of the
 8 2013 and 2014 incidents. They elicited testimony clearly referring to whether there were ever any
 9 issues with LN2 levels prior to March 4, 2018, while knowing the Court had excluded reference
 10 to the evidence that demonstrated the clinic had, in fact, experienced issues with LN2 levels prior
 11 to March 4. There is nothing attenuated or unfair about Chart now showing the data that
 12 demonstrates the same people in the same facility experienced low LN2 level issues before,
 13 especially where some of those same people have testified in front of the jury that such issues
 14 never occurred. Exclusion of this relevant evidence at this juncture would only serve to unfairly
 15 prejudice Chart's defense.

16 CONCLUSION

17 For the foregoing reasons, Chart respectfully requests that this Court permit Chart to
 18 introduce evidence of the 2013 and 2014 low LN2 incidents at the PFC lab.

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 20 Dated: June 1, 2021

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